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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re N.T., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. N.T., Defendant and Appellant.	A151384 (Napa County Super. Ct. No. JV18381)

N.T. (defendant), born in March 2000, appeals from the juvenile court's dispositional order finding he committed misdemeanor disorderly conduct (Pen. Code, § 647, subd. (j)(1)) and placing him on probation with various conditions. Defendant challenges the following probation conditions on appeal: (1) a condition prohibiting him from possessing a smart phone; (2) conditions requiring his assessment for—and if appropriate, participation in—sex offender counseling; and (3) a condition prohibiting him from entering into "a position of trust or authority" with a minor "unless under the authority and auspices of his school." We conclude the third challenged condition is vague and therefore remand the matter for the court to modify or strike the condition in light of the principles set forth in this opinion. We affirm the order in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On August 31, 2016, a juvenile wardship petition was filed charging then 16-year-old defendant with possession of child pornography (Pen. Code, § 311.11, subd. (a); count 1) and disorderly conduct (Pen. Code, § 647, subd. (j)(1); count 2). According to a probation report, defendant followed a female classmate into the girls bathroom and surreptitiously recorded a video of her using the toilet by holding his smart phone under the wall of her bathroom stall. The classmate yelled at defendant and he left. The classmate reported the incident to a school resource officer, and then found and confronted defendant and made him delete the video.

The school resource officer interviewed defendant, who admitted he took a video of his female classmate while using the toilet but denied forwarding the video to anyone or having inappropriate images or videos of other students. When the officer asked to search defendant's phone, defendant admitted he had sent the video to a friend and that he had "several photos and videos of female students" from his high school "while they were nude or engaging in sex acts." He said " 'a bunch of guys' send each other images and videos, but he could not remember who sent them." Defendant kept the images and videos in a " 'keepsake app' " on his smart phone that required his thumbprint to access. The officer viewed the images and videos and identified an image of a nude girl as another student at the school.

Defendant was a junior in high school at the time of the charged offense. He had a school disciplinary record reflecting 10 disciplinary actions beginning in 2011. In 2014, he was suspended for two days after video footage showed him stealing $120 from the school locker room while having another student act as a lookout. Other acts included defiance, disrupting class, plagiarism on three separate occasions, eating and littering in the locker room, and coming to class unprepared. A recent progress report showed he had good grades, with the exception of a "D" in math. He was on the high school football team and worked 10 hours per week on the weekends. Defendant's parents said

"their son is a 'good' kid" and that they believe "this to be an isolated incident of 'horseplay.' "

An evaluation showed that defendant's "target areas of concern" are his "antisocial cognition and his peer relationships" and his "planning and ability to carry out an act that completely disregarded the privacy of other students . . . ." In light of defendant's act and his past misbehavior, the probation officer recommended that defendant be placed on probation with various conditions.

At a hearing to determine whether defendant qualified for informal supervision (Welf. & Inst. Code, § 654.2), the juvenile court found defendant was not eligible because he "needs to have the probation department intervene in his life, to understand[] the wrongfulness of this, how it hurts those who are so victimized . . . ." The court noted that defendant's conduct "involved a series of acts" and seemed "more of a plan, and continuous course of conduct" than a single, spontaneous act.

As to jurisdiction, defendant admitted he committed misdemeanor disorderly conduct (count 2), and the juvenile court dismissed the child pornography charge (count 1) on its own motion. The district attorney did not agree to the dismissal of count 1.

At disposition, defense counsel objected to several proposed probation conditions including condition 13, which provided: "The minor cannot own or possess a smart cell phone." Counsel argued this was not "a case that warrants complete denial of having a cell phone." "That's a condition that made a lot of sense with . . . count one. But with count two only, it is basically an allegation of invasion of privacy using a cell phone."

Counsel also objected to conditions 28 through 30, which required defendant to participate in sex offender counseling, participate in psychological assessments, and sign a release for probation to communicate with professionals involved in his treatment. Counsel argued "it would be more appropriate to order him screened" and that "if that

screening indicates that he be required to participate [then the parties] should come back or request a change of conditions."

Counsel also objected to condition 31, which provided: "The minor may not enter into a position of trust or authority with any child under the age of 18." Counsel said he was unable to explain the condition when defendant asked him what it meant. Counsel questioned whether the condition would prevent defendant from "becoming a captain of a football team" or "being a leader of other people under the age of 18 . . . ."

The juvenile court imposed condition 13—possession of a smart phone—without modification. The court modified conditions 28 through 30 to require defendant to be "screened for sex offender counseling" and to enroll "if found appropriate . . . ."[1] The court modified condition 31 to state: "The minor may not enter into a position of trust or authority with any child under the age of 18, *unless under the authority and auspices of his school*." (Italics added.)

DISCUSSION

Smart Phone

Defendant contends the condition prohibiting him from possessing a smart phone is unconstitutionally overbroad because "it curtails [his] freedom of speech rights more than necessary to effectuate the government's purpose of rehabilitating [him] and protecting the public." Defendant did not object to the condition on this ground, but he is

[1] These conditions, as imposed, provided in relevant parts: (1) condition 28 – "The minor be screened for sex offender counseling, and if found appropriate, shall actively participate in, and complete a group sex offender counseling program at the discretion and direction of the probation officer"; (2) condition 29 – "The minor shall submit to any and all programs of psychological assessment at the discretion and direction of the probation officer or treatment provider, including . . . ABEL Screening and post dispositional polygraph examinations"; and (3) condition 30 – "The minor and his parents shall sign a release of information to allow the probation officer to communicate with other professionals involved in the treatment program and to allow all professionals involved to communicate with each other."

permitted to raise a facial challenge to the constitutionality of a condition for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*).) We therefore address the contention, and conclude it fails on the merits.

When a probation condition imposes limitations on a person's constitutional rights, it " 'must closely tailor those limitations to the purpose of the condition' "—that is, the probationer's reformation and rehabilitation—" 'to avoid being invalidated as unconstitutionally overbroad.' " (*People v. Olguin* (2008) 45 Cal.4th 375, 384; *In re Victor L.* (2010) 182 Cal.App.4th 902, 910 (*Victor L.*).) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) While conditions must be tailored to the probationer's needs and the state's interest in public safety, they need not be the narrowest possible means of achieving these goals. (See *In re Malik J.* (2015) 240 Cal.App.4th 896, 904; *In re P.O.* (2016) 246 Cal.App.4th 288, 298.)

Further, a probation condition that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. (*Victor L., supra,* 182 Cal.App.4th at p. 910.) "This is because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents. And a parent may 'curtail a child's exercise of . . . constitutional rights . . . [because a] parent's own constitutionally protected "liberty" includes the right to "bring up children" [citation,] and to "direct the upbringing and education of children." ' " (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.) Whether a probation condition is unconstitutionally overbroad presents a question

of law that we review de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143 (*Shaun R.*).)

The Court of Appeal addressed a similar issue in *Victor L., supra,* 182 Cal.App.4th 902, where a minor, a gang member, was placed on probation after admitting one count of misdemeanor possession of a dangerous weapon. (*Id.* at p. 908.) One of the minor's probation conditions was that he not possess " 'any paging device or any other portable communication equipment . . . without the express permission of the probation officer[.]' " (*Id.* at p. 909.) The minor argued on appeal that the condition was "overbroad, in violation of his First Amendment Rights, because it reaches constitutionally protected conduct and prohibits legitimate, legal uses of such devices." (*Id.* at p. 919.)

The Court of Appeal disagreed, holding that while wireless devices are "important media for communication," the minor's right of expression was not impeded by the fact that he would have to "employ less sophisticated means" of communication "such as a landline phone, the mail, or in-person contact." (*Victor L., supra,* 182 Cal.App.4th at pp. 919, 921 ["restriction on the *mode* of communication is viewed more tolerantly than a restriction on *content*," italics added].) The condition was also "narrowly tailored" "to prevent future crimes" because it prohibited the minor "only from using portable devices, through which he might be tempted to communicate with gang members or engage in illegal activity." (*Id.* at p. 921.)

In reaching its conclusion, the Court of Appeal distinguished *In re Englebrecht* (1998) 67 Cal.App.4th 486, 498, in which another appellate court held that a civil injunction to abate gang-related public nuisances was unconstitutionally overbroad to the extent it imposed "an all-encompassing ban on pagers and beepers" on named gang members. The *Victor L.* court held the circumstances in *In re Englebrecht* were different because there, the gang member challenging the injunction was an adult, whose constitutional rights are broader than those of a minor, and because he had a legitimate

personal and/or professional need for a pager. (*Victor L.*, *supra*, 182 Cal.App.4th at pp. 920–921.) The civil injunction imposed in *In re Englebrecht* also "targeted individuals who had not been convicted of any crime," whereas *Victor L.* dealt with "a term of probation tailored at least in theory to meet the needs of a juvenile offender who was found in possession of an illegal weapon." (*Id.* at p. 920.)

The *Victor L.* court rejected the minor's request to modify the condition to allow him to keep his cell phone but not use it for any unlawful purpose. (*Victor L.*, *supra*, 182 Cal.App.4th at p. 921.) The court held: "The complete ban on portable devices serves a legitimate purpose . . . in that it is easier for parents, school officials, and the probation department to detect and supervise a youth's communications if his or her access is limited to more conventional landlines, and to intervene when the use is improper. . . . While possession is relatively easy to detect and prove, proving how the minor used the phone would be more difficult." (*Id.* at pp. 921–922.) "In addition, the [juvenile] court could legitimately have concluded, based on [the minor's] demonstrated susceptibility to the unhealthy influence of the Sureño gang, that placing the device in his hands while telling him how he may or may not use it would be too much temptation for him to resist." (*Id.* at p. 922.)

We agree with the court's reasoning in *Victor L.* The condition prohibiting defendant from possessing a smart phone did not improperly curtail his constitutional right to freedom of speech because "less sophisticated means" of communication were still available to him, such as a non-smart cell phone, "a landline phone, the mail, or in-person contact." (*Victor L.*, *supra*, 182 Cal.App.4th at p. 921.) The condition was also narrowly tailored to prevent future crimes because it prohibited defendant from using the very type of device he used to commit the offense for which he was placed on probation.

Defendant asserts, as the minor did in *Victor L.*, that the condition should be modified to state that he may possess a smart phone but may not use it in any unlawful manner. The juvenile court, however, could have reasonably determined that the

temptation to misuse a smart phone would be too great for defendant. (*Victor L.*, *supra*, 182 Cal.App.4th at p. 922.) Likewise, the court could have believed that allowing defendant to possess only a non-smart cell phone would make monitoring his behavior and discovering further wrongdoing easier, especially in light of the fact that he was technologically sophisticated enough to hide sexually explicit images and videos in a " 'keepsake app' " that was accessible only with his thumbprint. (*Id.* at pp. 921–922.) We conclude the condition was not unconstitutionally overbroad.

Sex Offender Screening/Counseling

Defendant contends the juvenile court erred in imposing conditions 28 through 30 requiring his assessment for—and if appropriate, participation in—sex offender counseling. We disagree.

The juvenile court is authorized to "impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) " 'In fashioning the conditions of probation, the . . . court should consider the minor's entire social history in addition to the circumstances of the crime.' " (*In re R.V.* (2009) 171 Cal.App.4th 239, 246.) The court has "broad discretion to fashion conditions of probation," and that "discretion will not be disturbed in the absence of manifest abuse." (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5.)

A juvenile court acts beyond its discretion in setting conditions of supervision where a particular condition " '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*), superseded on another ground as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290–295.) The third prong of *Lent* requires some "factual nexus" between the record of an offender's conduct and the probation condition. (*People v. Burton* (1981) 117 Cal.App.3d 382, 390; *In re Erica R.* (2015) 240

Cal.App.4th 907, 913.) As the *Lent* test makes clear, however, "even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*People v. Olguin*, *supra*, 45 Cal.4th at p. 380; *In re P.O.*, *supra*, 246 Cal.App.4th at pp. 295–296 [a warrantless search condition imposed on the minor's electronic devices and social media accounts was reasonably related to preventing future criminality as a means of supervision, notwithstanding that it did not bear immediately on his conviction for public intoxication].) In other words, an explicit connection to past criminal conduct is unnecessary so long as the condition is reasonably "fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).)

Psychological counseling is a reasonable probation condition where the record reflects actual or potential risk factors that treatment would address and that are "critical to [the defendant's] rehabilitation and successful completion" of probation. (*People v. Malago* (2017) 8 Cal.App.5th 1301, 1307.) The crime of conviction need not stem directly from the issues targeted by the counseling conditions so long as the conditions reasonably relate to future criminality. (*Ibid.*) Thus, in *In re Todd L.* (1980) 113 Cal.App.3d 14, 18–20 (*Todd L.*), the Court of Appeal upheld a probation condition that required a minor—who had a disciplinary record and family conflicts—to cooperate with a plan for psychological testing and treatment despite the lack of connection between his mental health and conviction for petty theft. Noting that "[t]he purposes of the Juvenile Court Law include 'to secure for each minor under the jurisdiction of the juvenile court such care and guidance . . . as will serve the spiritual, emotional, mental and physical welfare of the minor,' " the court held the condition was reasonably related to preventing the minor's future criminality. (*Id.* at pp. 20–21.)

Similarly, here, conditions 28 through 30 were reasonably related to defendant's rehabilitation and to the goal of preventing his future criminal misconduct. Defendant had a history of disciplinary actions and exhibited "antisocial cognition, which appears to be the underlying issue driving his behavior." Defendant's case plan stated that his "anti-social cognition, coupled with his parents[']minimization of his behavior, demands treatment services in the community, to prevent out of home placement." Assessment and treatment could place him on the right path and provide him with the knowledge and skills necessary to become a productive member of society. (See *Todd L.*, *supra,* 113 Cal.App.3d at pp. 18, 20–21.) As the prosecutor suggested, counseling could help defendant humanize and empathize with his victims, thereby preventing him from acting in disregard of the privacy of others in the future. Sex offender assessment was especially appropriate in this case where his misconduct was sexual in nature.

Further, as noted, the juvenile court modified the conditions at defendant's request to be contingent on an initial assessment of whether he even needs sex offender counseling. Thus, defendant will be subject to counseling only if a qualified professional determines it is appropriate for him. We conclude the court did not abuse its discretion by imposing the conditions.

Position of Trust or Authority

Defendant contends the condition prohibiting him from entering into "a position of trust or authority" with a minor "unless under the authority and auspices of his school" is unconstitutionally vague and overbroad, and unreasonable under *Lent*. We agree the condition is vague.

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*Sheena K.*, *supra,* 40 Cal.4th at p. 890.) "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the

due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions. [Citations.]' [Citation.]" (*Ibid*.) Thus, if people " ' "of common intelligence must necessarily guess" ' " at the meaning of a probation term such that it risks " ' "arbitrary and discriminatory application," ' " it is unconstitutionally vague. (*Ibid*.; *In re D.H.* (2016) 4 Cal.App.5th 722, 728–729 [the term "pornography" is inherently vague and must be modified "to define more precisely the material the court intends to prohibit"]; *In re P.O.*, *supra*, 246 Cal.App.4th at p. 299 ["Reasonable minds can differ about what it means to 'be of good behavior and perform well' at school or work and to 'be of good citizenship and good conduct' "].) We review vagueness claims de novo. (*Shaun R.*, *supra*, 188 Cal.App.4th at p. 1143.)

We conclude the condition prohibiting defendant from "enter[ing] into a position of trust or authority" with a minor is not " 'sufficiently precise' " to give defendant notice of the conduct expected of him. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) First, as defendant notes, the condition does not define the term "position of trust," which "could be interpreted . . . to include dating or befriending another minor, including a same-aged peer." Despite this, the juvenile court stated while discussing another probation condition that defendant "ought to be able to . . . ask[] a young woman out on a date" and "go on a date and go to a movie . . . ." Reasonable minds can differ as to whether the portion of the condition prohibiting defendant from entering into a position of "trust" "with" another minor precludes him from dating or having close relationships with his peers.

Second, as noted, defense counsel questioned whether the condition, which also prohibits defendant from entering into a position of "authority," would prevent him from "becoming a captain of a football team" or "being a leader of other people under the age of 18 . . . ." Counsel said he was not able to explain to defendant what the condition meant. On appeal, defendant asks whether the condition would prevent him from participating in activities that keep him engaged in school and his community, such as

tutoring or leading a school club. The juvenile court did not respond to counsel's question, and it is not clear from the record what type of "position" of "authority" the court intended to cover when it imposed the condition.

The condition is also impermissibly vague because it lacks a knowledge requirement. In *Sheena K., supra*, for example, the Supreme Court held that a probation condition prohibiting the minor from associating "with anyone 'disapproved of by probation' " was unconstitutionally vague because it did not provide the minor with advance notice of those "with whom she [is not allowed to] associate . . . ." (40 Cal.4th at pp. 890, 891.) The Supreme Court held that a modified condition specifying that the minor is not to associate "with anyone '*known to be* disapproved of' by a probation officer or other person having authority over the minor" was constitutionally valid. (*Id.* at p. 892, italics added.) In *In re Justin S.* (2001) 93 Cal.App.4th 811, 816, the Court of Appeal modified a condition prohibiting a minor's association with "any gang members" to prohibit only association with "persons *known to the probationer* to be associated with a gang." (Italics added.) Similarly, here, the condition does not include a knowledge requirement and therefore does not provide defendant with adequate notice of the conduct that is prohibited. (*Sheena K., supra*, 40 Cal.4th at p. 890.)

Accordingly, we will remand the matter to the juvenile court to modify the condition to clarify the conduct that is prohibited and include a knowledge requirement, or to strike the condition, if appropriate. In light of our conclusion, we need not, and will not, address defendant's argument that the condition is also overbroad and unreasonable as written.

DISPOSITION

The matter is remanded to the juvenile court to modify or strike probation condition 31 in light of the principles set forth in this opinion. In all other respects, the order is affirmed.

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Jenkins, J.

We concur:

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Siggins, P. J.

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Petrou, J.